Supreme Court, U.S.
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No. 97-1433

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UIS, INCORPORATED,
Petitioner,

v.

INTERKAL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

CHARLES E. RITTER
Counsel of Record
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
444 West Michigan Avenue
Kalamazoo, Michigan 49007
(616) 381-7030

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

Whether certiorari is warranted to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the United States District Court for the Western District of Michigan's determination that it had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) where:

(i) It is undisputed that the Petitioner and Respondent are diverse to each other in citizenship and Respondent sought and received approximately $400,000 in money damages; and

(ii) The decision of the Court of Appeals correctly applied Supreme Court precedent and no conflict exists between the decision of the Court of Appeals in this case and decisions from other circuits.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties and their attorneys.

Respondent Interkal, Inc. is wholly owned by Kotocorp (USA), Inc., a Delaware Corporation, which in turn is wholly owned by Kotobuki Corporation, a Japanese Corporation.

Although never a party. Sumitomo Marine & Fire Insurance Co., Ltd., a Japanese Corporation, was the insurer of Interkal, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On July 29, 1996, following a non jury trial, the United States District Court for the Western District of Michigan ("District Court") entered a judgment in favor of the Plaintiff-Respondent, Interkal, Inc. ("Interkal"), a Michigan corporation with its principal place of business in Michigan, and against Defendant-Petitioner, UIS, Inc. ("UIS"), a New York corporation with its principal place of business in New York, in the amount of $399,177.40. Pet. App. A11-A12. Relevant events before and after entry of the judgment are set forth below.

1. Pretrial Events (May 25, 1994 to August 8, 1995).

Interkal and Sumitomo Marine Management (U.S.A.), Inc. ("SMM"), the management company for its insurer, commenced this action against UIS in District Court in-

voking federal diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (1996). Interkal also invoked jurisdiction supplemental to the diversity jurisdiction asserted by SMM pursuant to 28 U.S.C. § 1367(a). Pet. App. A42.

SMM, in its capacity as alleged partial subrogee of Interkal, sought to recover from UIS approximately $382,500 paid on behalf of Interkal in indemnity and defense expenditures with respect to defending and settling a group of product liability actions filed in Maryland state court ("underlying litigation"). Pet. App. A49. Interkal also sought a declaration of rights under an indemnification clause expressed in a written Asset Purchase Agreement entered into in 1981 between UIS and WFD Holding Co. which later changed its name to Interkal. Pet. App. A42-A45. Also, Interkal sought to recover from UIS out of pocket sums it incurred in connection with the underlying litigation. Pet. App. A39-A52. The entire Asset Purchase Agreement, redacted only as to monies paid, was appended to the complaint as an exhibit. Pet. App. A53-A83. The parties agreed that the Asset Purchase Agreement would be governed by and construed according to the laws of the State of Michigan. Pet. App. A82.

SMM asserted (incorrectly) it was a "New Jersey corporation with its principal place of business located in Warren, New Jersey." Pet. App. A40. Interkal is and was asserted to be a "Michigan corporation with its principal place of business located in Kalamazoo, Michigan." Pet. App. A40. Defendant, UIS, is and was asserted to be a "New York corporation with its principal place of business located in New York, New York." Pet. App. A41. Respecting federal subject matter jurisdiction, plaintiffs asserted:

> Jurisdiction is based on 28 U.S.C. § 1332(a) because there is diversity of citizenship of the parties and the amount in controversy, with respect to each plaintiff separately and both plaintiffs together, ex-

> ceeds the sum of Fifty Thousand ($50,000.00) Dollars. Jurisdiction over Interkal's claims is also based on 28 U.S.C. § 1367(a) because Interkal's claims are so related to Sumitomo's claims that they form part of the same case or controversy.

Pet. App. A42.

As to damages, in addition to those sought by SMM, Interkal asserted:

> As a result of the failure and refusal of UIS to defend and indemnify Interkal in connection with the Charles County, Maryland bleacher cases referred to above, Interkal has incurred attorneys fees and expenses in the amount of $22,297.52 in assisting Sumitomo and UIS under the terms of the Agreement, notwithstanding UIS's breach of the Agreement. Also, Interkal incurred in-house expense in the amount of $5,100.00 in fabricating and shipping a demonstration bleacher for use at trial in Maryland which should be reimbursed by UIS under the terms of the Agreement. Finally, the refusal of UIS to defend and indemnify Interkal has, on information and belief, resulted in a significant increase in its insurance premiums which increase is expected to continue into the future regardless of the outcome of this litigation.

Pet. App. A48-A49.

The parties filed cross motions for summary judgment before the District Court. On April 26, 1995, the District Court heard and decided the cross motions. Pet. App. A98-A100. The District Court determined that the indemnification provisions of the Asset Purchase Agreement appended to plaintiffs' complaint were clear and unambiguous and that Petitioner UIS was obliged to indemnify Interkal with respect to losses sustained as a result of the underlying litigation. Pet. App. A100. A trial on the issue of damages was then set.

2. First Trial Session (August 8, 1995 to August 9, 1995).

On the first day of trial, counsel for UIS advised the District Court that a potential defect in its subject matter jurisdiction existed because SMM was not a real party in interest. UIS also suggested that the claims asserted by Interkal, standing alone, did not exceed the jurisdictional amount requirement of 28 U.S.C. § 1332. UIS argued to the District Court that, under its view of Michigan law, Interkal's claim for increased insurance premiums was not recoverable. UIS argued that without the claim for increased insurance premiums, Interkal's damages would be less than $50,000. Pet. App. A34. Interkal presented proofs that for two of the three policy years which had passed, Interkal was charged additional premiums of $21,298.33 for policy year 1994-1995 and $20,916.73 for policy year 1995-1996 solely as a result of the refusal of UIS to honor its obligations under the indemnification provisions of the Asset Purchase Agreement. Resp. App. 1a.

3. Trial Adjourned to Address Proper Party Issue.

Following testimony from an officer of SMM confirming that the insurer issuing the insurance policy to Interkal was Sumitomo Marine & Fire Insurance Co. Ltd., ("SMF") a foreign corporation, the District Court adjourned trial on the merits and granted UIS an opportunity to conduct discovery on jurisdictional issues relating to SMF. The District Court also granted Interkal the option either to voluntarily dismiss the action without prejudice, or to substitute SMF for SMM.

After it was discovered that SMM was a New York corporation and therefore not diverse to UIS, Interkal moved to either substitute SMF for SMM, or, alternatively, to drop SMM as a party plaintiff. UIS moved the District Court to enter an order dismissing the action without prejudice for want of federal subject matter jurisdiction. UIS asserted that at the time of filing the action,

incomplete diversity of citizenship existed between UIS and SMM; that SMF, not SMM, was the real party in interest; and, the value of the amount in controversy as to Interkal was less than $50,000.00 because Michigan law did not permit recovery for "increased insurance premiums."

The District Court granted Interkal's motion to dismiss SMM. The district court denied UIS's motion to dismiss, concluding that Interkal alone had asserted "in good faith" a claim exceeding $50,000 in value and noting that UIS had not contended that Interkal had failed to make a good faith claim of sufficient amount. Pet. App. A16-A17. The District Court held:

> Defendant does not contend that plaintiff Interkal failed to make a good faith claim of sufficient amount. Instead, defendant contends that Interkal is unlikely to succeed on one aspect of its claim, and thus to recover less than the required amount in controversy. Essentially, defendant now asks the Court to make a determination of how much Interkal is entitled to recover, and if that amount totals less than $50,000, to dismiss the case for lack of subject matter jurisdiction. This position is not supported by the case law.
>
> Even if the Court were to rule that Interkal is not entitled to prevail on one aspect of its claim for damages arising out of UIS's breach of contract as a matter of law, this decision would not counsel dismissal; once a good-faith claim of the requisite amount has been made in the complaint, "subsequent events that reduce the amount below the statutory requirement do not require dismissal." *Jones* [*v. Knox Exploration Corp.*], 2 F.2d [181,] at 182-83. Interkal's complaint asserted a claim for declaratory relief and a claim for breach of contract. The request for declaratory relief asked the Court to enter an order that defendant UIS was obligated under the terms of the Asset Purchase Agreement "to indemnify and defend Interkal with respect to any other present or future claims arising out of or relating to bleachers manufactured[,] sold and shipped . . . on

> or before December 31, 1980." Complaint, at ¶ 31. At the onset of this case, the aggregate amount in controversy of these two claims was more than $50,000, and satisfied the amount in controversy requirement. While the Court later denied Interkal the declaratory relief requested, this in no way changes the fact that a good faith claim of the requisite amount was made in the complaint. *Klepper* [*v. First American Bank, Inc.*], 916 F.2d [337], at 341 [(6th Cir. 1990)].

Pet. App. A16-A17.

The District Court also allowed Interkal to amend its complaint to assert the claims of SMF or to allow SMF to move to intervene not later than April 11, 1996. Pet. App. A20-A21. Interkal filed a First Amended Complaint asserting its claims and those of SMF on or about May 7, 1996. Pet. App. A84-A96.

4. Trial Completed (July 29, 1996).

After Interkal and UIS rested, UIS moved the Distrit Court pursuant to Fed. R. Civ. P. 52(c), among other matters, for judgment dismissing the claim of Interkal for increased insurance premiums upon the grounds that increased insurance premiums were not contemplated by the parties' written agreement and that Interkal's proof at trial on this issue was speculative. The District Court granted UIS's motion concluding that these losses, whether speculative or not, were not within the contemplation of the parties as expressed in the Asset Purchase Agreement, and granted UIS's motion for partial judgment as to these claims. Pet. App. A12. Upon the conclusion of trial, the District Court entered judgment in favor of Interkal, the only plaintiff, in the total amount of $399,177.40.

5. Appeal to the Sixth Circuit (December 3, 1997).

UIS appealed the District Court judgment to the United States Circuit Court of Appeals for the Sixth Circuit.

On December 3, 1997, a three judge panel of the Court of Appeals in an unpublished opinion, unanimously affirmed the decision of the District Court on all issues raised by UIS on appeal. Pet. App. A1-A10. In rejecting UIS's jurisdictional argument, the Court of Appeals held:

> A federal district court has original jurisdiction over diversity cases only "where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs." 28 U.S.C. § 1332(a) (1996). The only basis for federal court jurisdiction in this case is diversity of citizenship.
>
> The appellant argues that the appellee's claim for damages for increased insurance premiums were not recoverable as a matter of Michigan law and therefore could not be used in determining if the jurisdictional amount was satisfied, making the complaint insufficient on its face in terms of satisfying the minimum amount-in-controversy. The appellant bases its contention that the appellee's claim for damages for increased insurance premiums is prohibited as a matter of Michigan law on the established rule that breach of contract damages are recoverable only for those damages that either arise naturally from the breach or that were contemplated by the parties at the time the contract was made. *See Kewin v. Mass. Mutual Life Ins. Co.*, 295 N.W.2d 50, 52-53 (Mich. 1980). The appellant reasons that damages for increased insurance premiums were not contemplated by the parties as evidenced by their absence from the explicit terms of the asset purchase agreement, and were thus prohibited as a matter of Michigan law, making the amount sought in damages ineligible for satisfying § 1332. This argument fails. The damages are not prohibited as a matter of law *per se*. Rather, the issue is one of contract interpretation. As the issue is a matter of contract interpretation, it is not apparent "to a legal certainty" that the appellee could never recover damages for increased insurance premiums. See *Knox Exploration Corp.*, 2 F.3d at 182. "[T]he legal impossibility of recovery must be

> so certain as virtually to negative the plaintiff's good faith in asserting the claim. If the right of recovery is uncertain, the doubt should be resolved . . . in favor of the subjective good faith of the plaintiff." *Tongkook American, Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 785 (2d Cir. 1994) (quoting *McDonald v. Patton*, 240 F.2d 424, 426 (4th Cir. 1957)). The fact that the appellee's claim for increased premiums was eventually found to have insufficient evidentiary support is irrelevant to its role in satisfying the amount in-controversy requirement. *See Klepper v. First American Bank, Inc.*, 916 F.2d [337, 341 (6th Cir. 1990)]. Accordingly, we find that the district court properly had jurisdiction of this case. Pet. App. A6-A7.

REASONS TO DENY THE PETITION

I. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THE DISTRICT COURT HAD JURISDICTION OVER THIS CASE UNDER 28 U.S.C. § 1332(a).

UIS asserts that the courts below improperly refused to dismiss the case because Interkal could not satisfy the requisite amount in controversy required by 28 U.S.C. § 1332(a) for diversity jurisdiction. In the complaint and first amended complaint, Interkal alleged that the amount in controversy exceeded the jurisdictional amount requirement of $50,000. Pet. App. A42, A86. The leading case with respect to the jurisdictional amount requirement of 28 U.S.C. § 1332(a) is *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L. Ed. 845 (1938), in which this Court stated the rule as follows:

> The rule governing dismissal for want of jurisdiction in federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls, if the claim is apparently made in good faith. It must

> appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

303 U.S. at 288-289.

In determining whether the amount in controversy has been satisfied, courts look to the complaint at the time it was filed. *Klepper v. First American Bank,* 916 F.2d 337, 340 (6th Cir. 1990); *Worthams v. Atlantic Life Ins. Co.,* 533 F.2d 994, 997 (6th Cir. 1976). If a good-faith claim of a sufficient amount is made in the complaint, subsequent events that reduce the amount below the statutory requirement do not require dismissal. *St. Paul Mercury,* 303 U.S. at 289; *Jones v. Knox Exploration Corp.,* 2 F.3d 181, 182-183 (6th Cir. 1993); *Klepper,* 916 F.2d at 340.

The lower courts properly applied these well-settled rules of diversity jurisdiction in considering UIS's motion for dismissal for lack of jurisdiction.

A. Interkal's first amended complaint sought damages far in excess of $50,000 and, pursuant to Fed. R. Civ. P. 15(c) and 28 U.S.C. § 1653, related back to the filing of the original complaint thereby giving the District Court diversity jurisdiction over this matter.

Interkal originally brought this action against UIS along with SMM, a managing company for Interkal's insurer, SMF. During the course of the litigation it was determined that SMM was not diverse in citizenship to UIS. Interkal and SMM moved, pursuant to Fed. R. Civ. P. 21, to drop SMM as a party plaintiff as SMM was a dispensable nondiverse party. The District Court cited *United States v. Aetna Casualty & Surety Co.,* 338 U.S. 366, 382, 70 S.Ct. 207, 94 L.Ed. 171 (1949), which held that where an insurer has become partially subrogated to the rights of an insured, both are necessary but not indispensable parties. Pet. App. A15. The District Court, relying on this Court's decision in *Newman-Green, Inc. v.*

Alfonzo-Larrain, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed. 2d 893 (1989), permitted SMM to be dropped as a party on March 29, 1996. Pet. App. A14-A16 and A20-A21. UIS did not assert on appeal to the Court of Appeals, nor does it assert in its Petition to this Court, that the District Court erred by permitting the case to proceed with Interkal as the sole plaintiff asserting claims on its own behalf and on behalf of SMF.[1]

On May 7, 1996, Interkal filed an amended complaint as the sole plaintiff seeking damages in its own right and on behalf of SMF in excess of $50,000. Pet. App. A84-A86. Interkal sought damages of $307,500 representing the amounts paid by SMF, its insurer, to settle the underlying litigation. Interkal also sought over $71,000 for attorneys' fees expended by SMF to defend Interkal in the underylnig litigation. Interkal sought over $22,000 for attorneys' fees it incurred in defending the underlying litigation and almost $5,100 it incurred in constructing a model bleacher for use at trial. Interkal also sought damages for increased insurance premiums which resulted from Interkal having to tender the defense of the underlying litigation to SMF, its insurer. In addition, Interkal sought declaratory relief from the District Court seeking a declaration with respect to the rights between Interkal and UIS under the terms of the indemnification provision of the Asset Purchase Agreement. As Interkal had the right to prosecute this action on its own behalf and on behalf of its partially subrogated insurer, SMF, the claim presented by Interkal in its first amended complaint exceeded $450,000. *See United States v. Aetna Casualty & Surety Co.*, 338 U.S. at 382; *Krueger v. Cartwright*, 996 F.2d 928 (7th Cir. 1993); *Virginia Electric and Power Co. v. Westinghouse Electric Corp.*, 485 F.2d 78 (4th Cir. 1973).

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[1] Had SMF been substituted for SMM, diversity would have been preserved since SMF is a Japanese Corporation with its principal place of business located in Tokyo. Given the amount claimed by SMF, supplemental jurisdiction over the claim of Interkal which arose out of the same transactions would clearly be allowed.

As set forth above, in determining whether the amount in controversy has been satisfied, courts look to the complaint at the time it was filed. *Klepper*, 916 F.2d at 340; *Worthams*, 533 F.2d at 997. However, in this case the court could look to Interkal's first amended complaint to determine whether the amount in controversy requirement had been satisfied. Fed. R. Civ. P. 15(c) provides that amendments of pleadings relate back to the date of the original pleading when "the claim or defense arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading". Interkal's first amended complaint set forth the same claims that were set forth in the original complaint and sought damages in excess of $400,000. In its Judgment Order the District Court awarded Interkal $399,177.40 for the claims brought on its own behalf and on behalf of SMF. Also 28 U.S.C. § 1653 permits amendment to correct jurisdictional allegations at any step of the proceedings. There can be no question that the jurisdictional amount requirement was satisfied by the claims asserted by Interkal in the first amended complaint.

B. The District Court had jurisdiction over this case where the federal jurisdictional requirements of 28 U.S.C. § 1332(a) were satisfied at the time the District Court entered its final judgment.

In its petition to this Court, UIS asserts that Interkal alone could not meet the amount in controversy requirement at the time of the filing of the original complaint. UIS also asserts that this case should be remanded to District Court for dismissal for lack of subject matter jurisdiction notwithstanding the fact that this case proceeded to trial and a final judgment was awarded solely to Interkal against UIS in excess of $400,000. Pet. 16-17. This argument fails for the reasons set forth above. In addition, UIS's position is at odds with the reasoning contained in this Court's decisions in *Caterpillar, Inc. v. Lewis*, 519 U.S. ——, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996), and *Newman-Green, Inc. v. Alfonzo-Larrain*,

490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). In *Caterpillar*, this Court faced a slightly different question: whether the absence of complete diversity of citizenship at the time of removal is fatal to federal court adjudication where the federal jurisdictional requirements are met at the time judgment is entered. This Court held that the district court's error in failing to remand the case which was improperly removed did not preclude the district court from finally deciding the case so long as the requirements of federal jurisdiction were satisfied at the time the final judgment entered. *Caterpillar*, 136 L.Ed.2d at 451-452. This Court considered the "overwhelming" considerations of finality, efficiency, and economy:

> Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938), considerations of finality, efficiency, and economy become overwhelming.
>
> Our decision in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), is instructive in this regard. *Newman-Green* did not involve removal, but it did involve the federal courts' diversity jurisdiction and a party defendant whose presence, like Whayne Supply's in this case, blocked complete diversity. *Newman-Green* proceeded to summary judgment with the jurisdictional flaw—the absence of complete diversity—undetected. See *id.* at 828-829, 104 L.Ed.2d 893, 109 S.Ct. 2218. The Court of Appeals noticed the flaw, invited the parties to address it, and, en banc, returned the case to the District Court "to determine whether it would be prudent to drop [the jurisdiction spoiler] from the litigation." *Id. at* 830, 104 L.Ed.2d 893, 109 S.Ct. 2218. We held that the Court of Appeals itself had authority "to dismiss a dispensable nondiverse party," although we recognized that, ordinarily, district courts are better positioned to make such judgments. *Id.* at 837-838, 104

> L.Ed.2d 893, 109 S.Ct. 2218. "[R]equiring dismissal after years of litigation," the Court stressed in *Newman-Green,* "would impose unnecessary and wasteful burdens on the parties, judges and other litigants waiting for judicial attention." *Id.* at 836, 104 L.Ed.2d 893, 109 S.Ct. 2218. The same may be said of the remand to state court Lewis seeks here. Cf. *Knop v. McMahan,* 872 F.2d 1132, 1139, n.16 (3d Cir. 1989) ("To permit a case in which there is complete diversity throughout trial to proceed to judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources.").

Caterpillar, 136 L.Ed.2d at 451-452.

Caterpillar and *Newman-Green* both involved situations where a lack of complete diversity of citizenship between the parties was eliminated at the time of judgment. The instant case addresses the other requirement of diversity jurisdiction—the amount in controversy requirement. Here, any perceived deficiency in that regard was eliminated not only by the Amended Complaint but also by the entry of judgment for Interkal in an amount close to $400,000. The same concerns of finality, efficiency, and economy are raised in the instant case as they were with *Caterpillar* and *Newman-Green.* The result should be the same in this case where diversity of citizenship and amount in controversy requirements are met at the time of judgment.

Interkal did satisfy the amount in controversy requirement based solely on its claims in the original complaint. However, even if Interkal had failed to satisfy that requirement at the onset of the case, the failure was cured by the filing of Interkal's amended complaint which clearly sought a sum well in excess of $50,000 and related back to the date of filing under Fed. R. Civ. P. 15(c); *see also* 28 U.S.C. § 1653. Since the federal jurisdictional

requirements were satisfied when the final judgment was entered, the District Court had jurisdiction over this case.

C. Interkal satisfied the jurisdictional amount requirement even if the damages sought and recovered on behalf of SMF are not considered in determining whether it satisfied the amount in controversy requirement of 28 U.S.C. § 1332(a).

UIS ignores the fact that in its amended complaint Interkal sought damages against UIS in excess of $400,000 and that it received a judgment of almost $400,000. UIS incorrectly asserts that Interkal could not rely on amounts it sought to recover on behalf of SMF in satisfying the amount in controversy requirement of 28 U.S.C. § 1332. Nevertheless, even assuming that Interkal could not rely on such amounts, Interkal satisfied the amount in controversy requirement.

Interkal sought and was awarded over $16,000 for attorneys' fees and for expenses incurred in defending the underlying Maryland litigation and almost $4,000 for constructing a demonstration bleacher for trial purposes. Interkal also sought damages for increased insurance premiums that resulted from having to tender the underlying litigation claims to its insurer, SMF. Before UIS breached its agreement with Interkal, the claims in the underlying litigation had been defended by CNA which even settled several claims on behalf of UIS and Interkal. Resp. App. 2a. At trial, Interkal submitted proofs that its insurance premiums with SMF increased $40,000 for the first two policy years of a three year policy after the claim was submitted to SMF. Resp. App. 1a; Pet. App. A37-A38. Based on these claims alone, Interkal's complaint exceeded the $50,000 jurisdictional amount requirement. UIS argues that Interkal could not rely on its claim for damages for increased insurance premiums because this claim was barred by Michigan "remedial law" and the District Court granted UIS's Fed. R. Civ. P. 52(c) motion on this claim. Pet. 12. UIS's argument misses the

mark. "The legal impossibility of recovery must be so certain as virtually to negative the Plaintiff's good faith in asserting the claim. If the right of recovery is uncertain, the doubt should be resolved . . . in favor of the subjective good faith of the Plaintiff." *Tongkook America, Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 785-786 (2d Cir. 1994) (quoting *McDonald v. Patton*, 240 F.2d 424, 426 (4th Cir. 1957). Interkal had a good faith basis for asserting a claim for consequential damages in the form of increased insurance premiums.

Michigan state courts and federal courts applying Michigan law have allowed recoveries for plaintiffs in breach of contract claims to recover consequential damages such as lost profits even where those damages were not specifically provided in the contract. *See Lawrence v. Will Darrah & Associates, Inc.*, 516 N.W. 2d 43 (Mich. 1994) (reversing grant of summary disposition to defendant because plaintiff submitted enough evidence on the element of foreseeability to make out a prima facie case for lost profits); and *Salamey v. Aetna Casualty & Surety Co.*, 741 F.2d 874 (6th Cir. 1984) (Sixth Circuit upheld trial court's grant to plaintiff of lost profits as damages for breach of contract even though contract did not provide for such damages in event of breach). These damages were awarded because they arose naturally from the breach or they were in the contemplation of the parties at the time the contract was made. *Kewin v. Massachusetts Mutual Life Insurance Co.*, 295 N.W. 2d 50, 52-53 (Mich. 1980).

In *Lawrence, supra*, the court stated that Michigan has a "flexible approach when determining the foreseeability of contract damages." *Lawrence*, 516 N.W. 2d at 47. The *Lawrence* court cited Professor Corbin on the flexible approach to damages for breach of contract:

> The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise

> is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by special circumstances of the particular case. [5 Corbin, Contracts, § 1002, p. 33.]

Lawrence, 516 N.W. 2d at 47, n. 12.

The *Lawrence* court concluded that the trial court correctly permitted the plaintiff's claim for lost profits to go to the jury and that the jury's award of damages for lost profits was sufficiently supported by the evidence of the case and the nature of the underlying transaction:

> The evidence in this case, when combined with the nature of the underlying transaction,[17] was sufficient to allow the jury to infer that at the time the parties entered into the contract, the defendant reasonably knew or should have known that in the event of breach this plaintiff would lose profits.
>
> ---
>
> [17] We disagree that the nature of the transaction alone can never be enough . . ." *Lawrence*, 445 Mich. at 14, n.17.

Michigan courts have recognized that determining consequential damages is "largely dependent on the circumstances of each case . . . and is essentially a question of fact." *McNeal v. Tuori*, 309 N.W. 2d 588, 592 (Mich. App. 1981). *See also, Lawrence*, 516 N.W. 2d at 47. This is further confirmed by the fact that UIS brought a motion attacking Interkal's claim for increased insurance premiums under Rule 52(c) of the Federal Rules of Civil Procedure for judgment on partial findings. Rule 52(c) states that judgments entered under the rule must be supported by findings of fact. Fed. R. Civ. P. 52(c). Indeed, this is precisely what the District Court did: "After considering this matter, the court finds that any such losses, whether speculative or not, were not within the completion of the parties' agreement in fact as expressed in the 1981 asset purchase agreement." Pet. App. A38.

A number of courts have recognized the validity of claims for consequential damages in the form of increased insurance premiums. See *Williams Enterprises, Inc. v. Strait Manufacturing & Welding, Inc.*, 728 F.Supp. 12, 21 (D. D.C. 1990) (cross-plaintiff prime contractor entitled to $135,000 damages for increased insurance premiums [$45,000 insurance payments per year for three years] resulting from accident on job-site attributable to the negligence of the cross-defendant); *aff'd in part and remanded in part on other grounds, Williams Enterprises Inc. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991) (specifically affirming the district court's award of damages for increased insurance premiums); and *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 653 F.Supp. 451, 462-463 (D. Mass. 1986) (court denied defendant's motion to preclude evidence regarding alleged increase in insurance premiums on grounds that the damages were not foreseeable and too speculative and the court permitted the issue to be presented at trial).

In the instant case, a direct and foreseeable result of UIS's failure to indemnify Interkal was Interkal's need to rely on its own insurer to defend and settle the underlying litigation. It is foreseeable that insurance companies will raise premiums of insureds based on adverse claims experience. Before the breach by UIS, its insurer, CNA, had defended and settled several of the underlying Maryland claims. Resp. App. 2a. Certainly, UIS would expect to see this adverse claims experience reflected in its insurance premiums.

The purchasers under the terms of the Asset Purchase Agreement were former officers and employees who had operated the "old Interkal" for UIS before they purchased its assets including its name, after which it became what is now referred to as "new Interkal" (Interkal in this Brief). Both parties to the sale were aware of products liability history and of the possibility for future loss. Both UIS and Interkal had insurance coverage for this exposure.

Both knew that adverse claims experience would affect premiums. Thus, based upon the Michigan Supreme Court's "flexible approach" to determining the foreseeability of contract damages, Interkal had a good faith belief that it had sufficiently stated a claim upon which relief could be granted for increased insurance premiums.

Also, the very broad language of the indemnification provision in the Asset Purchase Agreement supports the view that UIS was required to pay any losses, including increased insurance premiums, incurred by Interkal arising out of a claim relating to a product sold and shipped before December 31, 1980.

The fact that Interkal was ultimately awarded less than $50,000 on the claims brought in its own right did not deprive the District Court of its jurisdiction over the case. *St. Paul Mercury*, 303 U.S. at 289; 28 U.S.C. § 1332(b). 28 U.S.C. § 1332(b) clearly provides that district courts retain jurisdiction over a matter even where the plaintiff is finally adjudged to be entitled to recover less than the jurisdictional amount.

Interkal also sought declaratory relief asking the District Court to declare that UIS was obligated under the terms of the Asset Purchase Agreement to indemnify Interkal with respect to any other present or future claims arising out of or relating to bleachers sold and shipped by old Interkal on or before December 31, 1980. This relief requested by Interkal was worth much more to Interkal than the $50,000 jurisdictional amount requirement of 28 U.S.C. § 1332(a). *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 347; 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (in actions seeking declaratory relief, the amount in controversy is measured by the value of the object of the litigation).

Had the District Court granted it the declaratory relief, Interkal could have relied on the declaratory relief to avoid having to defend litigation falling under the terms

of the indemnification provision of the asset purchase agreement. The value of the declaratory judgment to Interkal would have well exceeded the $50,000 jurisdictional amount requirement, particularly when combined with the monetary relief sought by Interkal. See Resp. App. 3a. The fact that the District Court denied this relief does not mean that Interkal failed to plead this request for relief in good faith. *St. Paul Mercury*, 303 U.S. at 289.

For these reasons, the courts below correctly decided that the District Court had jurisdiction over this case under 28 U.S.C. § 1332(a) and UIS's petition should be denied.

II. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT OR WITH DECISIONS FROM OTHER CIRCUIT COURTS OF APPEALS AND NO FURTHER CLARIFICATION OF *ST. PAUL MERCURY INDEMNITY CO. v. RED CAB CO.*, IS NEEDED AS A RESULT OF THIS CASE.

In its petition to this Court, UIS argues that the decision of the Court of Appeals conflicts with this Court's opinion in *St. Paul Mercury Indemnity Co. v. Red Cab Co., supra*, and that it conflicts with a number of decisions from various circuit courts of appeals. Pet. 10-11. UIS also argues that "the court of appeals' reasoning adds an unwarranted gloss to the test this court handed down in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938)." Pet. 12. UIS never identifies this "unwarranted gloss". The Court of Appeals' decision in this case consistently followed and applied Supreme Court precedent.

The cases cited by UIS from a number of different circuit courts of appeals are not at odds with the Court of Appeals' decision in this case. UIS admits that all of these cases involved situations where either "a valid and enforceable express limitation of liability clause in a contract,

or an applicable state statute limits damages to a sum less than the jurisdictional minimum." Pet. 10.[2] Wright, Miller and Cooper have addressed this issue:

> Generally speaking, the legal certainty test makes it very difficult to secure a dismissal of a case on the ground that it does not appear to satisfy the jurisdictional amount requirement. Only three situations clearly meet the legal certainty standard: 1) when the terms of a contract limit the plaintiff's possible recovery; 2) when a specific rule of law or measure of damages limits the amount of damages recoverable; and 3) when independent facts show that the amount of damages was claimed to obtain federal court jurisdiction.

14A Wright, Miller and Cooper, Federal Practice § 3702 at 49-50. UIS cannot avail itself of the first situation identified by Wright, Miller and Cooper. UIS can point to no express contractual limitation on Interkal's possible recovery. Unlike many of the cases cited by UIS, the indemnification agreement in this case does not contain a

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[2] UIS cites six cases at page 10 of its Petition in support of its assertion of a conflict between this case and cases from other circuits. Each of these cases differs significantly from the instant case. *Sanchez-Arroyo v. Eastern Airlines, Inc.*, 835 F.2d 407 (1st Cir. 1987) (the contract at issue limited liability for loss or damage to luggage to $1250); *Valhal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195 (3rd Cir. 1995) (the contract limited the design professional's liability to not more than $50,000); *Sellers v. O'Connell*, 701 F.2d 575 (6th Cir. 1983) (a decision of the board of trustees of plaintiff's retirement fund limited the amount in controversy to less than the jurisdictional amount); *Pratt Central Park Limited Partnership v. Dames & Moore, Inc.*, 60 F.3d 350 (7th Cir. 1995) (the contract capped damages at $5,000); *Pachinger v. MGM Grand Hotel Las Vegas, Inc.*, 802 F.2d 362 (9th Cir. 1986) (the Nevada Innkeeper statute limited plaintiff's recovery to less than the jurisdictional amount); and *Kalpakian v. Oklahoma Sheraton Corp.*, 398 F.2d 243 (10th Cir. 1968) (Oklahoma statute limited hotel's liability for loss of deposited property to less than the jurisdictional amount).

provision limiting the amount of Interkal's recovery to less than the jurisdictional amount.

UIS's attempt to avail itself of the second situation identified by Wright, Miller and Cooper also fails. The only cases UIS cites to support this second situation are *Pachinger v. MGM Grand Hotel Las Vegas, Inc. Inc.*, 802 F.2d 362 (9th Cir. 1986) (the Nevada Innkeeper statute limited plaintiff's recovery to less than the jurisdictional amount), *Kalpakian v. Oklahoma Sheraton Corp.*, 398 F.2d 243 (10th Cir. 1968) (Oklahoma statute limited hotel's liability for loss of deposited property to less than the jurisdictional amount), and *Parmelee v. Ackerman*, 252 F.2d 721 (6th Cir. 1958). In *Parmelee*, the plaintiff asserted a claim for breach of contract for less than the jurisdictional amount. The plaintiff also sought emotional distress damages as a result of the breach which the plaintiff claimed satisfied the jurisdictional amount requirement. Ohio law did not permit recovery of emotional distress damages for breach of contract on the facts as they were alleged in the complaint.

The instant case involves no express contractual limitation or statutory limit with respect to damages. Further, contrary to assertions made by UIS, Michigan law does not per se prohibit recovery of consequential damages such as increased insurance premiums.

UIS did not claim or provide any independent facts to show the amount of damages claimed was done solely to obtain diversity jurisdiction. UIS cites no cases to this Court which present analogous facts to this case and in which a circuit court of appeals reached a conflicting result. UIS attempts to create a conflict where none exists. The cases relied upon by UIS are easily distinguishable from the instant case in that the courts in those cases could readily determine the inability of the plaintiff to meet the jurisdictional amount requirement from the face of the pleadings.

The District Court in the instant case could not make such a determination from the face of the pleadings. The District Court was faced with a factual issue and had to determine from the proofs whether the claimed damages for increased insurance arose naturally from the breach or were reasonably in the contemplation of the parties at the time the contract was made and whether the amounts claimed were proven. *Lawrence,* 516 N.W. 2d at 48. Therefore, it was not apparent to a legal certainty that Interkal could never recover damages for increased insurance premiums and Interkal's good faith assertion of a claim exceeding the jurisdictional amount controls.

CONCLUSION

Respondent respectfully requests that the Petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

CHARLES E. RITTER
Counsel of Record
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
444 West Michigan Avenue
Kalamazoo, Michigan 49007
(616) 381-7030

April 2, 1998

APPENDIX

APPENDIX

INTERKAL EXPERIENCE RATING FACTORS

Policy Term	Exp. Mod. Calculation		Premium Base	Total Premium W/All Claims	Total Premium Excl. Claim	Premium Savings
	All Claims	Excluding LG Claim				
1994-95	1.88	1.58	$70,994.45	$133,469.57	$112,171.23	$21,298.33
2.27	1995-96	1.97	$69,722.44	$158,269.94	$137,353.21	$20,916.73

[Excerpt From Plaintiff's Exhibit 17]
4:94-CV-82

[Defendant's Exhibit D-13]

CRAWFORD & COMPANY

SUMITOMO MARINE

September 23, 1993

Ms. Cheryl A. Lowden, A.I.C.
Manager—National Claims Technical
Sumitomo Marine Management, U.S.A., Inc.
P.O. Box 4602
Warren, NJ 97059

RE:	Insured:	Interkal, Inc.
	Claimant:	Shekelton, Et Al
	Date of Loss:	9/9/88
	C & C File No.:	646-16015
	SMM File No.:	PKG3000712/07

Dear Cheryl:

This will acknowledge receipt of your correspondence dated 5/14 and 9/10/93 and will serve as our current status report.

We are currently maintaining an indemnity reserve totaling $500,000.00 covering all of the remaining plaintiffs.

Please be advised that the attorney representing CNA and their insured UIS has settled all but sixteen claims. Thus far, we have not had to contribute to the settlement of any of these claims.

* * * *

Our handling adjuster secured the 1981 purchase agreement between UIS and Interkal. Interkal has been of the opinion that based upon the contract UIS should be indemnifying them completely. UIS has failed to do so and based upon the asset purchase agreement, the agreement shall be construed according to the laws of the state of

Michigan. Therefore, Interkal has advised that it does not wish Sumitomo to undertake any independent action forcing this indemnification issue without express approval. According to defense counsel the filing of such an indemnification claim could have implications far beyond this immediate dispute and apparently could cause substantial difficulties for Interkal. Again, we have not made any contribution towards any of the settlements effected thus far.

* * * *

Regardless, we will request that our handling adjuster and defense counsel maintain communication with CNA's counsel to monitor settlement negotiations.

The trial of this matter remains scheduled for October 25, 1993 and we will have our adjuster further confirm this.

Very truly yours,
CRAWFORD & COMPANY

/s/ Susan L. Bevington
SUSAN L. BEVINGTON
Account Administrator
Sumitomo Unit
NEASC